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IN THE COURT OF APPEALS OF INDIANA

SACHS & HESS, P.C.,

Appellant/Plaintiff/Counter Defendant/ Third-Party Defendant,

and

ROBERT M. HESS,

Counter Defendant/Third-Party Defendant,

vs.

LAYER, TANZILLO, STASSIN & BABCOCK, P.C., RONALD F. LAYER, MICHAEL D. BABCOCK, ANDREW R. TANZILLO and LARRY D. STASSIN,

Appellees/Defendants/Counter Claimants/ Third-Party Plaintiffs,

and

BETH SIMMONS,

Defendant.

No. 45A03-0806-CV-332

INTERLOCUTORY APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Jeffery J. Dywan, Special Judge
Cause No. 45D11-0703-PL-26

February 18, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Plaintiff/Counter Defendant/Third-Party Defendant Sachs & Hess, P.C. ("S&H"), appeals from the denial of its request for a preliminary injunction against Appellees/Defendants/Counter Claimants/Third-Party Plaintiffs Layer, Tanzillo, Stassin & Babcock, P.C. ("LTSB"), Ronald F. Layer, Andrew R. Tanzillo, Larry D. Stassin, and Michael D. Babcock (collectively, "Appellees"). Appellees also request that we award them appellate attorneys' fees. We affirm the trial court and deny Appellees' request for appellate attorneys' fees.

FACTS AND PROCEDURAL HISTORY

On August 29, 2005, Layer, Tanzillo, Stassin, and Babcock, who had been attorneys employed by S&H, left to form LTSB. Approximately 550 cases, of which approximately 292 were contingency-fee cases, transferred from S&H to LTSB as a result of the quartet's leaving. Over the course of the next several months, LTSB attempted on numerous occasions to convince S&H to discuss the matter of what share of fees earned on cases resolved by LTSB, but originated by S&H, would be paid to S&H. No agreement on the matter of division of fees was reached, although all agree that S&H is entitled to collect a portion of the fee earned from any resolved LTSB case originated

at S&H. At some point in August or September of 2006, LTSB paid $137,000.00 to a bank against a line of credit from an escrow account it had apparently established primarily for the purpose of holding attorney fees owed to S&H.

In November of 2006, S&H filed suit against LTSB and Layer and requested a preliminary injunction against the parties, but it later abandoned its request. On August 13, 2007, S&H filed its first amended complaint against LTSB and Layer, Tanzillo, Stassin, Babcock, and Beth A. Simmons as individuals. The first amended complaint alleges, against varying parties, breach of contract, tortious interference and conversion, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, constructive fraud, computer tampering, tortious interference with contractual rights, tortious interference, breach of promise and wrongful payment of funds, overpayment of compensation, breach of contract and attempted conversion, and unauthorized use of funds. The amended complaint also requested another preliminary injunction.

On November 21, 2007, S&H filed an amended motion for preliminary injunction against Appellees requesting that LTSB deposit all past and future fees collected from cases that originated at S&H in a joint account (to which LTSB would not have unilateral access) until the trial court could enter a judgment as to their distribution, render a full accounting of previously-resolved cases, and promptly notify S&H of all future resolutions. On May 8, 2008, following a hearing, the trial court denied S&H's motion for a preliminary injunction. On May 30, 2008, S&H filed its notice of appeal.

DISCUSSION AND DECISION

I. Whether the Trial Court Abused its Discretion in

Denying S&H's Motion for a Preliminary Injunction

S&H contends that the trial court abused its discretion in denying S&H's motion for a preliminary injunction that would require LTSB to deposit all fees generated by the cases transferred from S&H into an account from which it could not draw for the duration of this litigation.

> The denial of a motion for preliminary injunction rests within the sound discretion of the trial court, and our review is limited to whether there was a clear abuse of that discretion.
>
> When determining whether or not to grant a preliminary injunction, the trial court is required to make special findings of fact and state its conclusions thereon. When findings and conclusions are made, the reviewing court must determine if the trial court's findings support the judgment. The trial court's judgment will be reversed only when clearly erroneous. Findings of fact are clearly erroneous when the record lacks evidence or reasonable inferences from the evidence to support them.
>
> We also determine whether the trial court's conclusions are contrary to law. We consider the evidence only in the light most favorable to the judgment and construe findings together liberally in favor of the judgment. Although we defer substantially to the trial court's findings of fact, we review questions of law de novo.
>
> In order to obtain a preliminary injunction, the moving party has the burden of showing by a preponderance of the evidence that: (1) the movant's remedies at law are inadequate, thus causing irreparable harm pending resolution of the substantive action; (2) the movant has at least a reasonable likelihood of success at trial by establishing a prima facie case; (3) the threatened injury to the movant outweighs the potential harm to the nonmovant resulting from the granting of the injunction; and (4) the public interest would not be disserved. The movant must prove each of these requirements to obtain a preliminary injunction. If the movant fails to prove even one of these requirements, the trial court cannot grant an injunction.
>
> The power to issue a preliminary injunction should be used sparingly, and such relief should not be granted except in rare instances in which the law and facts are clearly within the moving party's favor.

Planned Parenthood of Ind. v. Carter, 854 N.E.2d 853, 863 (Ind. Ct. App. 2006) (citations and quotation marks omitted and paragraph formatting altered).

We conclude that S&H has failed to establish irreparable harm, and, as such, we need not address the other three requirements. S&H seems to concede that it would suffer, at worst, economic harm from the activity it seeks to have enjoined. As a general rule, "A party suffering mere economic injury is not entitled to injunctive relief because damages are sufficient to make the party whole." *Ind. Family & Soc. Servs. Admin. v. Walgreen Co.*, 769 N.E.2d 158, 162 (Ind. 2002) (citing *Xantech Corp. v. Ramco Indus.*, 643 N.E.2d 918, 921-22 (Ind. Ct. App. 1994)). S&H nonetheless seeks to satisfy the "irreparable harm" requirement by alleging illegal activity on the part of LTSB and other defendants.

> [W]here the action to be enjoined is unlawful, the unlawful act constitutes *per se* "irreparable harm" for purposes of the preliminary injunction analysis. *Ferrell v. Dunescape Beach Club Condominiums Phase I, Inc*., 751 N.E.2d 702, 713 (Ind. Ct. App. 2001). When the *per se* rule is invoked, the trial court has determined that the defendant's actions have violated a statute and, thus, that the public interest is so great that the injunction should issue regardless of whether the plaintiff has actually incurred irreparable harm or whether the plaintiff will suffer greater injury than the defendant. *See* BLACK'S LAW DICTIONARY 1162 (7th ed. 1999) (*per se* means of, in, or by itself). Accordingly, invocation of the *per se* rule is only proper when it is clear that a statute has been violated.

Short On Cash.net of New Castle, Inc. v. Dep't of Fin. Inst., 811 N.E.2d 819, 823 (Ind. Ct. App. 2004).

S&H alleges that Appellees have engaged in criminal conversion in their handling of the attorney fees at issue. Specifically, S&H argues that LTSB has committed criminal conversion by failing to pay fees due to S&H in the Lynn Peters and Estate of Barrera cases and in making payments to the Estate and against a line of credit from an escrow account. "A person who knowingly or intentionally exerts unauthorized control over

property of another person commits criminal conversion, a Class A misdemeanor." Ind. Code § 35-43-4-3(a) (2006). Here, the trial court specifically concluded that "Plaintiff has not demonstrated that the action by LTSB was an act of criminal conversion." Appellant's App. p. 26. We cannot say that the trial court's conclusion in this regard is clearly erroneous.

In our view, there is sufficient evidence in the record to support findings that LTSB did not commit criminal conversion in any of the instances cited by S&H. In the Peters case, Layer collected a $10,000.00 fee for referring a case to an Illinois attorney. In the end, even though Layer had referred the case to the Illinois attorney while still employed by S&H, LTSB retained all of the $10,000.00 fee. When asked about the fee, however, Layer testified that he believed S&H was entitled to collect none of it. At the very least, Layer's testimony on this point, which the trial court apparently believed, supports a finding that, even if any of LTSB's employees exerted unauthorized control of S&H's money in the Peters case, those persons did not do so with the necessary *mens rea* for criminal conversion. Indiana Code section 35-41-2-2 provides, in part, that "[a] person engages in conduct 'intentionally' if, when he engages in the conduct, it is his conscious objective to do so" and that "[a] person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so." Quite simply, because Layer testified that none of the fee rightfully belonged to S&H, the trial court was entitled to believe that he could not have knowingly or intentionally exerted unauthorized control over it.

In the Estate of Barrera case, two lawsuits handled by S&H settled for a total of $50,000.00 in approximately October of 2004. The insurance carrier sent a settlement check to S&H, but it was never negotiated. Later, another settlement check was issued by the insurance carrier, sent this time to LTSB. This second check was also never negotiated. Finally, in August of 2007, LTSB drew on its escrow account, which apparently existed primarily to hold fees owed to S&H, and paid the Estate of Barrera the Estate's portion of the settlement.

S&H contends that it has never been paid any fee related to the Estate of Barrera case and that this failure to pay constitutes criminal conversion. There is evidence in the record, however, from which it could be inferred that S&H has been paid the fee to which it is entitled. It is undisputed that LTSB has actually paid $226,135.66 to S&H, including a $200,006.66 payment on October 15, 2007. Layer testified that that payment represented what LTSB believed to be S&H's share of fees from "[a]ll the cases that we've settled up to that time," which would have included the Estate of Barrera case. Tr. p. 98. In the absence of any evidence that the October 2007 payment did not include fees related to the Estate of Barrera case or that S&H is entitled to any more than the percentage that LTSB is paying it, the record supports a finding that S&H was paid its share of the fees generated by the case.

S&H also contends that LTSB committed criminal conversion when it used funds from the escrow to pay the Estate of Barrera's share of the settlement and to pay down a line of credit. Layer, however, testified that the money in the escrow account "wasn't [S&H's] money" and that "[i]t was our money." Tr. pp. 96-97. Again, because Layer

testified that he did not believe that the money in the escrow account was S&H's property, the trial court was entitled to conclude that he could not have knowingly or intentionally exerted unauthorized control over it. Moreover, there is no indication that any other person at LTSB had anything to do with either payment from the escrow account, much less anyone with the *mens rea* required to commit criminal conversion. Because S&H failed to establish *per se* irreparable harm by establishing unlawful conduct, the trial court did not abuse its discretion in denying its request for a preliminary injunction.

II. Indiana Professional Conduct Rule 1.15(e)

S&H also contends that LTSB's alleged violation of Indiana Rule of Professional Conduct 1.15(e) should support a preliminary injunction. The Rule in question provides as follows:

> When in the course of representation a lawyer is in possession of property in which two or more persons (one of who may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

While LTSB correctly points out that this court has no jurisdiction to mete out discipline for violations of the Rules of Professional conduct,[1] S&H is not seeking discipline but, rather, a preliminary injunction. For its part, S&H correctly points out that, while a Rule violation by itself is not actionable, "a lawyer's violation of a Rule may

[1] The Rules themselves clearly state that "[f]ailure to comply with an obligation of prohibition imposed by a Rule is a basis for invoking the disciplinary process" and that "[v]iolation of a Rule should not itself give rise to a cause of action against a lawyer[.]" Prof. Cond. R. Scope ¶¶ 19, 20.

be evidence of a breach of the applicable standard of conduct." Prof. Cond. R. Scope ¶ 20. S&H, however, fails to explain what this has to do with the denial of a request for preliminary injunction, which is the only issue before us at this stage of the litigation. S&H points to no authority that a Rule violation by itself is unlawful conduct, which would establish *per se* irreparable harm, or that the Rule violation it alleges, even if true, would give rise to anything beyond purely economic damages, denying it an adequate remedy at law.[2] Even assuming, *arguendo*, that LTSB has violated Indiana Rule of Professional Conduct 1.15(e), that violation, by itself, does not support the imposition of a preliminary injunction.

III. Appellate Attorneys' Fees

Appellees contend that "it is clear that the motive and intent by S&H [in requesting a preliminary injunction] was simply to harass and cripple LTSB" and request that we award them appellate attorneys' fees. Appellees' Brief p. 14. "The Court may

[2] S&H cites to *Gates, Duncan & Vancamp Co. v. Levatino*, 962 S.W.2d 21, 26 (Tenn. Ct. App. 1997), and *Anderson v. Middleton*, 430 S.E.2d 748, 749 (Ga. 1993), two cases in which a preliminary injunction was found to be proper in fee disputes between former business associates. Neither case persuades us, however, that an injunction would have been proper in this case. In *Gates, Duncan & Vancamp Co.*, Levatino was employed by an insurance partnership but was conducting insurance business on his own in violation of the partnership agreement. 962 S.W.2d at 23-24. Levatino appealed from, *inter alia*, the imposition of a temporary injunction freezing all disputed fees for the duration of the litigation. *Id*. at 26. While the Tennessee Court of Appeals upheld the imposition of the temporary injunction, *Gates, Duncan & Vancamp Co.* is readily distinguishable from this case. The Tennessee Court of Appeals does not provide us with its specific rationale in upholding the imposition of the injunction, but it did note that "[t]he record in this case is replete with evidence presented by plaintiff that Levatino engaged in a deliberate, willful and intentional course of conduct in misappropriating over $80,000.00." *Id*. at 27. Simply put, the record in *Gates, Duncan & Vancamp Co.* would easily support a finding of unlawful activity, while the trial court here specifically found that none occurred. As for *Anderson*, we know nothing of the facts of the case other than that it "is an appeal from the trial court's grant of a preliminary injunction in a dispute among attorneys over client files." *Anderson*, 430 S.E.2d at 749. Without any of the facts that gave rise to the imposition of the preliminary injunction or the Georgia Supreme Court's rationale in affirming, the case is of no help to S&H's cause.

assess damages if an appeal … is frivolous or in bad faith. Damages shall be in the Court's discretion and may include attorneys' fees. The Court shall remand the case for execution." Ind. Appellate Rule 66(E). Our discretion "is limited to instances 'when an appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay.'" *Boczar v. Meridian St. Found.*, 749 N.E.2d 87, 95 (Ind. Ct. App. 2001) (quoting *Orr v. Turco Mfg. Co.*, 512 N.E.2d 151, 152 (Ind. 1987)). Here, although we have ruled against S&H on the merits of its interlocutory appeal, we cannot conclude that its appeal is so devoid of merit as to have been obviously prosecuted in bad faith. We do not feel at liberty to further elaborate on our decision for fear of commenting on the merits of ongoing litigation.

The judgment of the trial court is affirmed, and Appellees' request for attorneys' fees is denied.

BAKER, C.J., and MAY, J., concur.